SUPREME COURT OF INDIA

Paper Products Limited

Vs

Commissioner of Central Excise, Mumbai

(Arijit Pasayat and L. S. Panta, JJ)

12.07.2007

JUDGMENT

DR. ARIJIT PASAYAT, J.

1. Challenge in these appeals is to the orders passed by the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai (in short the 'CEGAT') and Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (in short the 'CESTAT').

2. As common points are involved, they are taken up together for disposal.

3. So far as Appeal Nos.5317-5318/2002 are concerned they relate to order passed by CEGAT in Appeal No.E/566/02- Bom. Appeal No.5318 of 2002 relates to rejection of the application for rectification filed. Appeal No.7098 of 2005 relates to Appeal No.E/3617/04-MUM. For convenience the factual position in Civil Appeal Nos.5317-18 is noted:

4. Paper Products Ltd. the appellant was engaged in the manufacture of printed flexible packaging laminates and pouches. The printing of these goods is done by means of printing cylinders. These cylinders were being manufactured by Helio Gravure, Thane, a division of Paper Products Ltd. The Department investigation led it to believe that the charges for making printing cylinders were recovered by the appellant separately from the buyers of that product and did not include these charges in the assessable value of the laminates pouches etc. Notice dated 1.2.1994 was issued demanding duty of Rs.43.59 lakhs which was alleged to have been short levied. The Collector passed orders in December 1994 confirming the demand and imposed penalty. The assessee

challenged the order to the Tribunal. The Tribunal in its order reported in Paper Products Ltd. v. Collector of Central Excise, Bombay Â 1998 Indlaw CEGAT 3359 held that the charges that were paid for printing cylinders were includible in the value of the pouches and other such goods. It also held with regard to the service charges that the appellant recovered from its buyers "the activity for which the charges recovered must be regarded as an activity essential to enable the appellant to print the laminated cartons which are the appellant's final products and in this view also, the charges collected would be part of the assessable value." The Tribunal also noted that the appellant before it "had no case before the Adjudicating Authority that the cost of cylinders had been amortized to any extent" by the appellant. A further contention was raised before the Tribunal that duty chargeable on the finished product during a substantial part of the disputed period was nil either on account of the order of the Board dated 5.5.1999 or exemption notification 49/87 dated 1.3.1987. The Tribunal noted that those contentions had not been raised before the adjudicating authority observed that these stands would require factual investigation and felt that the controversy should be decided by the adjudicating authority and, therefore, remanded the case to the adjudicating authority for deciding on the two issues what is the correct rate of duty chargeable and correct amount of differential duty payable and the correct amount of penalty imposable. The Commissioner passed orders with regard to the remand proceedings by order dated 31.10.2001. The said order was challenged before CEGAT.

5. In his order, the Commissioner took the stand that the order of the Tribunal, and the order passed by the bench on a subsequent application for rectification of mistake in that order, made it clear that the question of amortization was not to be considered by him in the remand proceedings. He examined the applicability of notification 49/87 and the order of the Board dated 5.5.1989 and found that neither of them would apply. The assessee had not been shown fulfillment of the condition subject to which the exemption of notification 49/87 was available and the circular of the Board did not relate to the disputed period.

6. The contention of the counsel for the appellant before CEGAT was that the Commissioner should have taken into account the plea that the casting had been amortized. He relied upon the decision of the Tribunal in Flex Industries Ltd. v. Commissioner of Central Excise, Meerut Â 1997 Indlaw CEGAT 1861. According to CEGAT, that was not of any assistance to the appellant. The decision of the Tribunal which remanded the matter was clear and specific as to the terms of the remand. The Tribunal noted in paragraph 6 that the stand now taken before it, that the cost of the cylinder had been amortized in the price of the packing material was totally contradictory to the stand taken before the adjudicating authority, in the absence of any material placed before him to support the present stand. It said "in these circumstances, it follows that the amount collected under separate invoices represented, as admitted before the Adjudicating Authority, a part of the cost of printing cylinder". While it noted in paragraph 8 in accordance with the view taken in Flex Industries case (supra) that the cost of Cylinder must be reflected in the assessable value of the final product over a considerable period by amortizing the most, it stressed again that the appellant before it had no case before the adjudicating authority and the costing of cylinder had been amortized. It specifically stated in paragraph 12 the matter was being remanded to the adjudicating authority for passing a fresh order after deciding the two aspect, what is the correct rate of duty, if any, chargeable, the correct amount of differential duty, if any payable, and the correct amount of penalty.

7. The CEGAT found that the terms of remand were specific. The order of remand so far as relevant

reads as follows:

"The last contention urged is that during a substantial part of the disputed period, duty chargeable on the finished products of the appellant was nil rate of duty either on account of Board order, dated 5.5.1989 or on account of exemption Notification No.49/87, dated 1.3.1987. These contentions have not been raised before the Adjudicating Authority who, therefore, did not have the opportunity to apply his mind in this regard. Though these contentions have not been raised before the lower authority, we are inclined to grant the appellant permission to raise these contentions at this stage. Consideration of these contentions would require reference to the approved classification lists and the description of the goods covered by the Board's order and the notification and also require factual investigation. In this view, this controversy should be decided by the Adjudicating Authority."

8. Learned counsel for the appellant submitted that the remand was an open one and not a limited one. Therefore, the view expressed is not correct. It was submitted that the penalties imposed were higher.

9. Learned counsel for the respondents supported the impugned orders.

10. A bare reading of para 10 makes the position clear that it only related to the particular plea and no other plea which was covered by para 8. The scope of limited remand has been highlighted by this Court in Mohan Lal v. Anandibai and Ors. Â . It was observed at para 9 as follows:

"9. Lastly, counsel urged that now the suit has been remanded to the trial Court for reconsidering the plea of res judicata, the appellant should have been given an opportunity to amend the written statement so as to include pleadings in respect of the fraudulent nature and antedating of the gift deed Ext. P-3. These questions having been decided by the High Court could not appropriately be made the subject-matter of a fresh trial. Further, as pointed out by the High Court, any suit on such pleas is already time- barred and it would be unfair to the plaintiff- respondents to allow these pleas to be raised by amendment of the written statement at this late stage. In the order, the High Court has stated that the judgments and decrees and findings of both the lower courts were being set aside and the case was being remanded to the trial Court for a fresh decision on merits with advertence to the remarks in the judgment of the High Court. It was argued by learned counsel that, in making this order, the High Court has set aside all findings recorded on all issues by the trial Court and the first appellate Court. This is not a correct interpretation of the order. Obviously, in directing that findings of both courts are set aside, the High Court was referring to the points which the High Court considered and on which the High Court differed from the lower courts. Findings on other issues, which the High Court was not called upon to consider, cannot be deemed to be set aside by this order. Similarly, in permitting amendments, the High Court has given liberty to the present appellant to amend his written statement by setting out all the requisite particulars and details of his plea of res judicata, and has added that the trial Court may also consider his prayer for allowing any other amendments. On the face of it, those other amendments, which could be allowed, must relate to this very plea of res judicata. It cannot be interpreted as giving liberty to the appellant to raise any new pleas altogether which were not raised at the initial stage. The other amendments have to be those

which are consequential to the amendment in respect of the plea of res judicata."

11. Above being the position, there is no merit in these appeals which are dismissed, so far as levy of duty is concerned. However, considering the factual scenario the penalty is reduced to Rs.5 lakhs from Rs.10 lakhs.

12. So far as appeal No.7098 of 2005 is concerned, the primary stand is that the Commissioner at Hyderabad has accepted the stand of the assessee-appellant. But it appears in the instant case the admitted position was that there is a separate charge. CESTAT's order makes the position clear. The relevant portion of CESTAT order reads as follows:

ii) With reference to show cause notice dated 23.6.1994, the reply vide letter dated 26 July 1994 (Page 159). It was stated that the printing cylinders are manufactured by them in their factory i.e. M/S. Hello Gravure out of different materials and are incorporated with their various customers' motifs or designs. The printing cylinders cannot be considered as an input of flexible packaging laminate and its value cannot be included in the value of the flexible packaging laminate.

iii) In respect of show cause notice dated 5.10.1994 vide their letter dated 14.11.1994 (Page 164) it was stated that the charges for making printed cylinders are collected by them for M/s. Helio Gravure to whom these charges accrue and are shown in their books. They cannot obviously collect these charges in their invoices as these charges do not form part of cost of flexible packaging but they are part of cost of printing cylinders. They further stated the costs for artwork design and development of cylinders, which were reimbursed to them by their customers and accrue in the books of M/s. Helio and are incurred by their customers and not by them and therefore these costs are not to be included in the manufacturing cost.

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vi) In respect of show because notice dated 8.9.1995, vide reply dated 26th September, 1995 (Page 173) they submitted that cost of making printed cylinder is divided into two types of costing:

a) Cylinder per se, which is made of metal i.e. copper, is the property of M/s Helio Gravure. The cost of the metal cylinder is amortized in the flexible packaging laminate products.

b) Amortization is also done for the Artwork and the design work that are incorporated in the Cylinder."

13. It is to be noted that the Commissioner had adjudicated 23 show cause notices covering the period from 7.9.1993 to 31.3.2000. Earlier these notices were adjudicated vide Order in Original No.31/2001 Commr.M VI dated 3.10.2001 against which Appeal No.E/568/02 Mum was filed. The appeal was disposed of by the CEGAT with the following observations:

"The counsel of the appellant contends that identical issue, the inclusion in the cost of manufacture of finished goods i.e. printed plastic sheets, the cost of cylinders and a part recovery from the buyers, has already been considered by the Tribunal in Flex Industries Limited Vs. CCE Â 1997 Indlaw CEGAT 1861. He says that the Commissioner has not considered the cost sheets duly attested by the cost accountant, which was produced in support of its contention. We have seen copies of these cost sheets. While the Commissioner has concluded in his order that no evidence of amortization was furnished before him, it appears that he has not considered these cost sheets. We therefore propose to remand the matter to him for this purpose. In this process, the appellant shall be entitled to address the Commissioner on the issues raised in the notices and advance arguments in support. The department is also at liberty to advance submissions before the Commissioner. The Commissioner shall thereafter pass orders on the issues raised in the notices in accordance with law."

14. The stand seems to be that separate charge was made after Flex Industries case. The finding of CESTAT is to the following effect:

"From The Perusal Of Various Replies To The Show Cause Notice Submitted By The Appellant, As Pointed Out By The Jt. CDR, It Is Apparent That The Appellant Has Changed Its Stand From Time To Time. At Times A Plea Has Been Taken These Charges Are Not Includible Due To The Fact These Are Reimbursed By The Customers Being The Printing Cylinder Cost, and At Times Plea Has Been Taken That Those Charges Are Not Towards Cost Of The Cylinders But For Maintenance Of Printing Cylinder.",

15. That being so, the demand as levied does not suffer from any infirmity. But so far as penalty under Rule 173Q is concerned the same appears to be on the higher side. Considering the background facts the quantum of penalty is reduced from Rs.1 crore to Rs.50 lakhs.

16. The appeals are disposed of accordingly.